

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BRUCE KNIESPECK,
Plaintiff,

CIV. NO. S-01-0878 WBS PAN

v.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

UNUM LIFE INSURANCE COMPANY OF
AMERICA, et al.,

Defendants.

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Plaintiff Bruce Kniespeck brings this action under the Employee Retirement Income Security Act ("ERISA") to recover benefits under an employee benefits plan. See 29 U.S.C. § 1132(a)(1)(B). More specifically, plaintiff contends that he was wrongfully denied benefits on a group long-term disability policy issued by defendant UNUM Life Insurance Company of America ("UNUM").

By stipulation, the trial of this case was bifurcated into two phases, the second phase being a calculation of benefits due. On December 18, 2006, trial on the second phase was held by this court, sitting without a jury, on the administrative record according to the procedure set forth in Kearney v. Standard Ins. Co., 175 F.3d 1084 (9th Cir. 1999) (en

1 banc), cert denied, 528 U.S. 964 (1999). This court, having
2 read and considered the documentary evidence and the written
3 submissions of the parties, now makes the following Findings of
4 Fact and Conclusions of Law pursuant to Rule 52 of the Federal
5 Rules of Civil Procedure.

6 FINDINGS OF FACT¹

7 1. Plaintiff Kniespeck was employed as a Master
8 Scheduler/Planner for Nevada Western Supply, Inc. ("Nevada
9 Western"). (UACL 00429.)

10 2. At all relevant times, plaintiff was insured
11 under a group long-term disability insurance policy ("the
12 Policy") issued by defendant UNUM to Nevada Western. (UACL
13 01866 - 01890.)

14 3. The relevant portions of the Policy are as
15 follows:

16 SECTION II - DEFINITIONS

17 For the purposes of this policy:

18 "Disability" and "disabled" mean that because of
19 injury or sickness:

- 20 1. the insured cannot perform each of the material
duties of his regular occupation; and
21 2. after benefits have been paid for 24 months, the
22 insured cannot perform each of the material
23 duties of any gainful occupation for which he is
reasonably fitted by training, education or
experience.

24 * * *

25 "Partial disability" and "partially disabled" mean

26
27 ¹ The following facts are undisputed. They are all derived
28 from the administrative record (hereinafter "UACL"). (UACL 00013 -
02439, UAPO 001 - 025.)

1 that because of injury or sickness the insured, while
2 unable to perform all the material duties of his
regular occupation on a full-time basis, is:

- 3 1. performing at least one of the material duties of
4 his regular occupation or another occupation on a
part-time or full-time basis; and
- 5 2. earning currently at least 20% less per month
6 than his indexed pre-disability earnings due to
that same injury or sickness.

7 * * *

8 SECTION IV - BENEFITS

9 DISABILITY

10 When the Company receives proof that an insured is
11 disabled due to sickness or injury and requires the
12 regular attendance of a physician, the Company will
13 pay the insured a monthly benefit after the end of the
elimination period. The benefit will be paid for the
period of disability if the insured gives the Company
proof of continued:

- 14 1. disability; and
- 15 2. regular attendance of a physician.

16 The proof must be given upon request and at the
insured's expense.

17 * * *

18 PARTIAL DISABILITY

19 When proof is received that an insured is partially
20 disabled within 31 days of the end of a period during
21 which he received disability benefits the Company will
22 pay a monthly benefit. The partial disability must
result from the injury or sickness that caused the
disability.

23 * * *

24 MONTHLY BENEFIT

25 * * *

26 Proof of the insured's monthly earnings must be given
27 to the Company on a quarterly basis. Benefit payments
will be adjusted upon receipt of this proof of
earnings.

28 * * *

SECTION VI - GENERAL POLICY PROVISIONS

F. NOTICE AND PROOF OF CLAIM

* * *

2. Proof

- a. Proof of claim must be given to the Company. This must be done no later than 90 days after the end of the elimination period.

* * *

- c. Proof of continued disability and regular attendance of a physician must be given to the Company within 30 days of the request for the proof.

* * *

G. EXAMINATION

The Company, at its own expense, will have the right and opportunity to have an employee, whose injury or sickness is the basis of a claim:

1. examined by a physician, other health professional, or vocational expert of its choice; and/or
2. interviewed by an authorized Company representative.

(UACL 01866 - 01890.)

4. On July 6, 1989, plaintiff was injured when he fell down a set of stairs at work. (UACL 02312.)

5. As a result of spinal and other injuries sustained in the fall, plaintiff ceased working on September 13, 1989. (UACL 00429.)

6. Plaintiff was certified as disabled by a board certified neurosurgeon, Dr. Stanton Schiffer, M.D., on September 14, 1989, and again on October 30, 1989, as a result of lumbar

1 cervical radiculopathy, lumbar disc protrusion, and cervical
2 disc protrusion. (UACL 02249.)

3 7. On November 22, 1989, plaintiff filed a claim,
4 with an attached Attending Physician Statement ("APS") by Dr.
5 Schiffer, for disability benefits with UNUM. (UACL 00429,
6 02311.)

7 8. Plaintiff's claim was granted, and on December
8 13, 1989, plaintiff began receiving disability benefits
9 supported by the necessary certifications, APSs, and other
10 documents submitted to UNUM. (Id.)

11 9. Over the course of the next five or six years,
12 plaintiff underwent four surgeries related to his injuries,
13 including:

- 14 a. lumbar percutaneous discectomy at L4-5 in
15 December, 1989;
- 16 b. left shoulder impingement operation in October,
17 1990;
- 18 c. bilateral laminectomy and bilateral disc excision
19 and lumbar laminectomy at L4-5 and L5-S1 in
20 March, 1991; and
- 21 d. anterior cervical discectomy and interbody fusion
22 at C6-7 in October, 1995.

23 (UACL 00699.)

24 10. On December 12, 1992, plaintiff's treating
25 neurosurgeon, Dr. Schiffer, provided a detailed medical history
26 and evaluation of plaintiff's disability status, in which he
27 indicated that "[i]t has now been three and a half years since
28 Mr. Kniespeck's original date of injury. I feel that he has

1 reached a level of permanent disability where there will be
2 minimal changes in improvement . . . Chances of future
3 employment for Mr. Kniespeck are practically nil. With his
4 history of neck pain which continues to persist and his prior
5 surgeries of the left shoulder and the lumbar spine, there are
6 few employers who would be interested in assuming the liability
7 of hiring such an individual. (UACL 01850 - 01851.)

8 11. On June 1, 1993, as part of a supplemental claim
9 statement (UACL 01834), plaintiff's primary care physician, Dr.
10 Rajiv Pathak, M.D., submitted an APS, which indicated ongoing
11 neck, arm, and lower-back pain, as well as weakness in
12 plaintiff's left shoulder and both legs. (UACL 01835.) Dr.
13 Pathak also indicated that plaintiff had a "fair" prognosis for
14 recovery, but that significant changes, if any, would not occur
15 within six months. (Id.)

16 12. In a subsequent September 2, 1993, letter, Dr.
17 Pathak noted that plaintiff was experiencing pain in his neck,
18 lower back, and left shoulder and a limited range of motion in
19 his shoulder. As a result, he "can sit for a total of six hours
20 but not more than 30 minutes at a time. I would recommend at
21 least 10-15 minutes rest thereafter. He can walk for a total of
22 four hours with rest. He can lift up to 20 pounds on occasion,
23 and can occasionally bend, stoop, squat, kneel and climb steps."
24 (UACL 01812-01813.) Dr. Pathak refused, however, to opine as to
25 patient's ability to perform the duties of several occupations,
26 including "assistant buyer, production planner, and purchasing
27 agent," as complete job descriptions thereof had not been
28 provided to him. (Id.)

1 13. On January 6, 1994, plaintiff was discharged from
2 Fit to Work, a work hardening program, which indicated in its
3 discharge summary that plaintiff's physical limitations rendered
4 him incapable of meeting the job requirements of a Master
5 Scheduler/Planner. (UACL 01671.)

6 14. On January 27, 1994, Dr. Pathak diagnosed
7 plaintiff with: 1) cervical strain; 2) trapezius myositis; 3)
8 left shoulder strain; 4) muscle contraction headache; and 5)
9 mild bilateral carpal tunnel syndrome. Dr. Pathak further
10 stated that he did not foresee any significant improvement in
11 the near future. (UACL 01672.)

12 15. On August 10, 1994, plaintiff submitted a
13 supplemental claim statement, with an APS by Dr. Pathak echoing
14 his previous determination. (UACL 01669.)²

15 16. On June 22, 1995, neurosurgeon Dr. Franklin
16 Wagner, M.D., prepared a "physical capacities evaluation form"
17 for UNUM regarding plaintiff, which noted various limitations in
18 sitting, standing and lifting, and concluded that plaintiff was
19 disabled and incapable of performing even part-time work. (UACL
20 01581-01582.)

21 17. On October 25, 1995, Dr. Wagner performed a neck
22 surgery (a C6-7 anterior cervical discectomy and interbody
23 fusion) on plaintiff. (UACL 01560.) Dr. Wagner indicated to
24 UNUM that the "surgery was successful and the prognosis is good
25 for the patient to return to full time employment. The normal
26 recovery period for this type of surgery is two months." (Id.)

27
28 ² Plaintiff erroneously attributes this APS statement to
a non-existent "Dr. Kujir." (Pl.'s Trial Brief 21.)

1 18. On April 26, 1996, Dr. Wagner provided a
2 certificate of disability to UNUM, indicating that plaintiff was
3 completely disabled, but that recovery was expected around
4 approximately September 1, 1996. (UACL 01552.)

5 19. On May 24, 1996, the Social Security
6 Administration issued a decision regarding plaintiff's appeal of
7 the denial of his claim for disability benefits under the Social
8 Security Act. (UACL 01526-01537.) The Administrative Law Judge
9 concluded that plaintiff became disabled as a result of his July
10 6, 1989, injury, but that his disability ceased as of December
11 21, 1995. (UACL 01537.)

12 20. The judge commented that the "medical evidence
13 establishes that the claimant has experienced significant
14 improvement in his left shoulder and neck symptomology
15 following" the October 25, 1995, surgery. (UACL 01536.)
16 Although plaintiff continued to experience lower back pain and
17 discomfort, the judge determined that plaintiff had the
18 "capacity to perform a full range of sedentary work." (Id.)

19 21. On February 25, 1997, Pride Industries, a
20 vocational rehabilitation program, reported on a four-day
21 vocational evaluation, and concluded that plaintiff was likely
22 not "feasible for full time employment." (UACL 01391.) The
23 report did indicate, however, plaintiff's "desire to work" and
24 his "willingness to work in a flexible schedule" that might
25 enable him to work part time.

26 22. On May 1, 1997, plaintiff notified UNUM that he
27 was claiming "partial disability," based on the fact that he had
28

1 begun working part-time for his self-run company Comp-U-Mart.
2 (UACL 01080.)

3 23. On September 10, 1998, defendant UNUM closed
4 plaintiff's file, and terminated his claim for disability
5 benefits. (UACL 00944, 01143.)

6 24. UNUM's denial was based on plaintiff's "failure
7 to provide proof of an ongoing impairment," citing the portion
8 of the Policy under "DISABILITY" which required that he "be
9 under the regular care of a physician" and that he "provide
10 proof of a continuing disability." (UACL 01143.)

11 25. On January 4, 2000, plaintiff submitted a
12 supplemental claim statement, along with a doctor's certificate
13 by a chiropractor, Dr. Marvin Abbott, M.D., stating that
14 plaintiff was permanently disabled, and without possibility for
15 recovery. (UACL 00886-00887.)

16 26. Plaintiff appealed UNUM's denial of his claim for
17 disability benefits, which was subsequently denied on May 18,
18 2000. (UACL 00959.)

19 27. Thereafter, plaintiff filed this action under
20 ERISA, 29 U.S.C. § 1132(a)(1)(B), for breach of the Policy,
21 seeking to recover disability benefits. (Compl.)

22 28. This court bifurcated the trial: the first phase
23 was limited to the issue of the correctness of UNUM's decision
24 to terminate plaintiff's benefits for failure to prove continued
25 disability and regular attendance of a physician, while the
26 second phase was reserved for determining benefits, if any, due
27 plaintiff. (March 19, 2002 Pretrial Order.)
28

1 29. On May 29, 2002, this court ruled in the first
2 phase of trial that defendant's denial of plaintiff's disability
3 claim was improper. (May 29, 2002 Order.) Specifically, the
4 court determined that after May 1, 1997, plaintiff's claim
5 should have been processed as one for "partial disability" not
6 "total disability," and that under the Policy a claim for
7 partial disability does not require plaintiff to submit proof of
8 continued disability and regular attendance of a physician.
9 (Id.) The court remanded the matter back to defendant for
10 reconsideration consistent with its findings. (Id.)

11 30. Pursuant to this court's order, defendant
12 commenced a reconsideration of plaintiff's claim for partial
13 disability by requesting information related to his work
14 activities. (UACL 00897.)

15 31. In response, plaintiff provided tax returns for
16 1997, 1998, and 1999, which indicated gross revenues of \$4,250,
17 \$11,851, and \$14,451, respectively. (UACL 00836 - 00837.)

18 32. Plaintiff further informed defendant that a
19 reasonable estimate of his monthly earnings in 2000 - 2001 was
20 approximately \$100 per month, but that the loss of his computer
21 prevented him from providing documentation to that effect.³
22 (UACL 00838 - 00840).

23 33. On November 2, 2002, Vicki Riggs, UNUM's internal
24 CPA, did a calculation based on the income information provided
25 by plaintiff, and concluded that because plaintiff sustained an
26 overall earnings loss, he would be entitled to full monthly

27
28 ³ Plaintiff did not file tax returns for these two years,
because his income was below the minimum amount required to file.

1 benefits of \$1,717.20 per month after May 1, 1997. (UACL 00837,
2 001625.)

3 34. In a subsequent letter, plaintiff provided
4 defendant with a receipt book for 2002 and 2003, evidencing 18
5 sales transactions between June, 2002, and September, 2003, each
6 averaging approximately \$10 - \$15. (UACL 00737 - 00755.)

7 35. On January 19, 2004, Dr. Frank Kanovsky conducted
8 a brief overview of the case and concluded that there was
9 insufficient evidence to make a determination as to work
10 capacity. He recommended that plaintiff undergo an independent
11 medical examination ("IME") as well as a functional capacity
12 evaluation ("FCE"). (UACL 00691.)

13 36. Because of difficulties scheduling an IME, on
14 April 8, 2004, Dr. Kanovsky performed a comprehensive review of
15 plaintiff's medical file. Dr. Kanovsky noted plaintiff's
16 significant complaints of pain, but observed that plaintiff did
17 not take any regular pain medication, and that his symptoms
18 indicated a "non-anatomical distribution." Dr. Kanovsky again
19 indicated his opinion that an IME as well as other diagnostic
20 studies would aid in a more complete analysis. (UACL 00700.)

21 37. On July 13, 2004, an IME and medical record
22 review was conducted by Dr. Ronald Wolfson, M.D., a board
23 certified orthopedic surgeon. (UACL 00525.)

24 38. Dr. Wolfson's August 11, 2004, report indicated
25 that plaintiff presented significant subjective complaints, but
26 that the "objective factors of disability are more difficult to
27 determine." (UACL 00536.) While he noted that there were no
28 clear-cut signs of exaggeration, "clearly the subjective

1 complaints are much worse than they were ever noted even before
2 surgery.” (Id.) Dr. Wolfson suggested that additional x-ray
3 and MRI diagnostic tests be performed. (Id.)

4 39. On September 24, 2004, plaintiff underwent
5 multiple x-ray and MRI tests, which showed mild impingement of
6 the left shoulder (UACL 00489), narrowing of the C5-C6 disk
7 space (UACL 00491), mild disc bulge at C5-C6 (UACL 00485),
8 fusion of C6 and C7 (Id.), a small amount of spurring
9 posterolaterally to the left side of C4-C5 with slight
10 encroachment upon the left neural foramen (UACL 00487),
11 spondylolisthesis of L4 upon L5 and slight posterior
12 subluxation of L5 upon S1 (Id.), and soft tissue intrusion into
13 the anterior epidural space to the left of midline of L4-L5.
14 (Id.)

15 40. Dr. Wolfson reviewed these diagnostic studies,
16 and issued a supplemental report, in which he concluded that
17 “Mr. Kniespeck’s subjective complaints are way out of proportion
18 to his objective findings on the diagnostic studies. It is my
19 belief, after reviewing the studies that this man is able to
20 work full-time in the computer repair business” (UACL
21 00494.)

22 41. On January 21, 2005, Dr. Kanovsky reviewed Dr.
23 Wolfson’s reports, as well as the x-ray and MRI films. (UACL
24 00479.) He noted that for someone with his symptoms,
25 plaintiff’s lack of the need for pain medication, as well as his
26 decision to limit his treatment to occasional chiropractic
27 visits, undermined the credibility of his subjective complaints.
28 (Id.) Dr. Kanovsky indicated his agreement with Dr. Wolfson’s

1 conclusions that plaintiff was capable of working eight hours a
2 day, five days a week. (UACL 00471.)

3 42. On February 9, 2005, Dr. Lee Snook M.D.,
4 conducted a full independent medical examination, in which he
5 reviewed the file and complete medical record and conducted a
6 physical evaluation of plaintiff. (UACL 00463 - 00468.) Dr.
7 Snook concluded that plaintiff "is permanently disabled and is
8 unable to return to the work force in a full-time capacity."
9 (UACL 00467.)

10 43. On March 15, 2005, Dr. Wolfson reviewed Dr.
11 Snook's report, and disagreed with his conclusions. (UACL
12 00092.) Dr. Wolfson stated that "Dr. Snook has given an opinion
13 based on Mr. Kniespeck's subjective complaints of pain and may
14 have overlooked the objective findings in the case." (Id.)

15 44. On May 11, 2005, UNUM issued its decision to deny
16 further benefits to plaintiff based on the reports of Drs.
17 Kanovsky and Wolfson, concluding that plaintiff was neither
18 partially nor totally disabled because he was capable of working
19 on a full-time basis in a sedentary to light occupation. (UACL
20 00429-00443.) UNUM also concluded that plaintiff did not
21 qualify as "partially disabled" because he failed to
22 sufficiently prove that he was in fact working part-time. (Id.)

23 45. Plaintiff appealed UNUM's denial, largely by
24 providing an FCE performed by a physical therapist, Larry Gray,
25 two years prior.⁴ (UACL 00261 - 00268.)

26
27 ⁴ Plaintiff contends that Mr. Gray's report was issued on
28 November 2, 2005, however, the document itself shows a date of
November 2, 2003.

1 46. Mr. Gray's report indicated that plaintiff
2 likely: 1) could sit for no more than 30 minutes at a time
3 without a 10 minute rest period; 2) could stand in one position
4 for no more than 15 minutes without being allowed to change
5 position; 3) could not reach above 56 inches with his left arm;
6 4) could not lift certain heavy loads; and 5) could not perform
7 tasks below knee level. (UACL 00267.) Based on these
8 limitations, Mr. Gray concluded that plaintiff "would likely
9 only tolerate part-time work." (Id.)

10 47. On December 21, 2005, Dr. Wolfson issued a
11 supplemental report reviewing Mr. Gray's FCE report, in which he
12 disagreed with Mr. Gray's conclusions. (UACL 00237 - 00239.)
13 In relevant part, Dr. Wolfson opined that the FCE was not
14 objective, and expressed nothing more than Mr. Gray's opinion
15 based on plaintiff's subjective reporting. (Id.)

16 48. On December 28, 2005, Dr. Snook reviewed Dr.
17 Wolfson's supplemental report, and expressed his disagreement
18 with Dr. Wolfson's critiques of the FCE procedure. (UACL 00208
19 - 00210.) Dr. Snook stated "[t]here is multiple evidence on the
20 MRI and x-rays of spondylosis with degenerative disk disease,
21 degenerative joint disease, and previous surgeries. These alone
22 in a chronic pain practice are strongly correlated with chronic
23 pain presentations and attendant limitations." (UACL 00210.)
24 Dr. Snook also noted that pain "is in large part a subjective
25 perception," and thus is not something which can easily be
26 objectified or quantified. (Id.)

27 49. On January 6, 2006, Dr. Charles Sternberg, a
28 board certified neurosurgeon, performed a review of plaintiff's

1 medical history and claim file, and determined that plaintiff
2 was capable of sustaining "sedentary/light work with
3 accommodation to prevent overhead reaching with the left upper
4 extremity, minimize repetitive flexion-extension movements of
5 the neck, and allow changes in position as necessary for
6 comfort." (UACL 00219.) Dr. Sternberg also indicated his
7 opinion that the FCE report performed by Mr. Gray "did not
8 provide standardized measures of validity testing in any way."
9 (Id.)

10 50. On February 27, 2006, Mr. Gray responded to Dr.
11 Wolfson's critiques of the FCE, by noting that he employs a
12 "kinesio-psychological" method, which means that a trained
13 professional "is in total control of the tests and results at
14 all time" and that "subjective reports are taken into
15 consideration, but if they are not associated with objective
16 findings and observations they then have no value." (UACL
17 00083.)

18 51. On March 14, 2006, Dr. Sternberg responded to Mr.
19 Gray's letter of February 27, 2006, and noted that Mr. Gray's
20 style of FCE depends on the client's "self reporting of ability
21 combined with the evaluator's observation of performance. Mr.
22 Gray's system does not document objective physiological
23 parameters . . . nor does it provide documentation of the
24 claimant's consistency of effort." (UACL 00037 - 00038.) He
25 further states that much of the report lacks "medical
26 credibility," and fails to give a "credible objective evaluation
27 of the claimant's functional capacity." (Id.)
28

1 52. At some point in March, 2006, Richard Byard, a
2 vocational rehabilitation consultant, conducted a review of
3 plaintiff's restrictions and limitations, as well as his work
4 history, and concluded that plaintiff would be a viable
5 candidate for several occupations for which he had adequate
6 training and experience. (UACL 00087 - 00088.)

7 53. On April 5, 2006, UNUM denied plaintiff's appeal
8 of his adverse claim determination, based again on their belief
9 that: 1) he was capable of performing sedentary to light work
10 full-time; and 2) that his activities selling computer parts did
11 not constitute part-time work.

12 CONCLUSIONS OF LAW

13 1. ERISA provides for judicial review of a decision
14 to deny benefits to an ERISA plan beneficiary. See 29 U.S.C. §
15 1132(a)(1)(B).

16 2. ERISA creates federal court jurisdiction to hear
17 such a claim. See 29 U.S.C. § 1132(e).

18 3. ERISA benefits determinations are to be reviewed
19 de novo, "unless the benefit plan gives the administrator or
20 fiduciary discretionary authority to determine eligibility for
21 benefits or to construe the terms of the plan." Firestone v.
22 Burch, 489 U.S. 101, 115 (1989). An administrator has
23 discretion only where it is "unambiguously retained." Kearney,
24 175 F.3d at 1090 (quoting Bogue v. Ampex Corp., 976 F.2d 1319,
25 1325 (9th Cir. 1992)). As per this court's previous order, both
26 parties agree that the Policy contains no such language, and
27 thus UNUM's denial is to be reviewed de novo. (May 29, 2002
28 Order.)

1 _____ 4. In a de novo review, determining whether
2 plaintiff is entitled to disability benefits requires the court
3 to interpret the plan by looking "first to the terms of the plan
4 itself." Nelson v. EG & G Energy Measurements Group, Inc., 37
5 F.3d 1384, 1389 (9th Cir. 1994).

6 5. "When faced with questions of insurance policy
7 interpretation under ERISA, federal courts should apply federal
8 common law." Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125
9 (9th Cir. 2002) (citing Firestone, 489 U.S. at 110).

10 6. Under federal law, courts should then interpret
11 plan terms "in an ordinary and popular sense as would a [person]
12 of average intelligence and experience." Allstate Ins. Co. v.
13 Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985).

14 _____ 7. As this court determined in trial phase one,
15 plaintiff's claim should have been considered as one for
16 "partial disability" benefits after May 1, 1997. (May 29, 2002
17 Order.) Because defendants did not terminate plaintiff's
18 benefits until after that date (September 10, 1998), the
19 relevant analysis is whether plaintiff was, and continues to be,
20 entitled to partial disability benefits at the time of their
21 termination.

22 8. Unlike "total disability," a claim for "partial
23 disability" does not require that plaintiff submit proof of
24 continued disability or regular attendance of a physician. (May
25 29, 2002 Order.)

26 9. Nonetheless, a claimant receiving partial
27 disability benefits is still subject to the requirement that he
28 be "unable to perform all the material duties of his regular

1 occupation on a full-time basis" due to "sickness or illness."
2 (UACL 01874.) It is for this reason the Policy provides that,
3 at its own expense, UNUM has the "right and opportunity to have
4 an employee, whose injury or sickness is the basis of a claim .
5 . . examined by a physician." (UACL 01886.)

6 10. After review of the administrative record,
7 including all of plaintiff's relevant medical history, the court
8 concludes that plaintiff was and remains unable to perform all
9 the material duties of his regular occupation on a full-time
10 basis.

11 11. The evidence seems clear (and defendant does not
12 appear to dispute) that prior to plaintiff's October 25, 1995,
13 surgery, plaintiff was "totally disabled." This conclusion is
14 well supported by numerous reports and disability certifications
15 by Drs. Schiffer, Pathak, Abbot, and Wagner, as well as the Fit
16 To Work discharge report and the findings of the Social Security
17 Administration.⁵

18 12. After May 17, 1997, however, plaintiff stopped
19 submitting regular proof of disability, and apparently the only
20 regular medical care he sought was an occasional chiropractic
21 visit to Dr. Abbott.

22 13. With regard to plaintiff's physical capabilities,
23 this court finds plaintiff's complaints of pain, and
24 corresponding functional limitations, to be credible, and
25

26 ⁵ See Riedl v. General Am. Life Ins. Co., 248 F.3d 753, 759
27 n.4 (8th Cir. 2001) ("Although the Social Security Administration's
28 determination is not binding, it is admissible evidence to support
an ERISA claim for long-term disability benefits [on de novo
review].")

1 sufficiently supported both by the medical evidence as well as
2 the evidence of plaintiff's functional capacity.

3 14. "On de novo review, a district court may, in
4 conducting its independent evaluation of the evidence in the
5 administrative record, take cognizance of the fact (if it is a
6 fact in the particular case) that a given treating physician has
7 a 'greater opportunity to know and observe the patient' than a
8 physician retained by the plan administrator." Jabian v.
9 Hewlett-Packard Co., 349 F.3d 1098, 1105 (9th Cir. 2003)
10 (quoting Black & Decker Disability Plan v. Nord, 538 U.S. 822,
11 834 (2003)).

12 15. Counseling against a finding of disability
13 (either partial or total) are reports by Drs. Kanovsky, Wolfson,
14 and Sternberg, all of which conclude that plaintiff is capable
15 of returning to full time work. Notably, of the three, only Dr.
16 Wolfson examined plaintiff in person, while Drs. Kanovsky and
17 Sternberg's reviews were limited to consideration of plaintiff's
18 claim file and medical history.

19 16. As defendant points out, these doctors' reports
20 emphasize the lack of probative objective measures of
21 plaintiff's disability, focusing on the diagnostic MRIs and x-
22 rays taken in 2004. (Def.'s Trial Br. 21-22.) However,
23 plaintiff has continued to exhibit physical manifestations of
24 his injuries.

25 17. Specifically, in 2004, plaintiff's x-rays and
26 MRIs indicated mild impingement of the left shoulder (UACL
27 00489), narrowing of the C5-C6 disk space (UACL 00491), mild
28 disc bulge at C5-C6 (UACL 00485), fusion of C6 and C7 (Id.), a

1 small amount of spurring posterolaterally to the left side of
2 C4-C5 with slight encroachment upon the left neural foramen
3 (UACL 00487), spondylolisthesis of L4 upon L5 and slight
4 posterior subluxation of L5 upon S1 (Id.), and soft tissue
5 intrusion into the anterior epidural space to the left of
6 midline of L4-L5. (Id.)

7 18. While defendant, as well as Drs. Kanovsky,
8 Wolfson, and Sternberg, thus all admit that plaintiff does have
9 some objective indicators of physiological neck, back, and
10 shoulder problems (Id. at 8), they contend that these objective
11 measures do not comport with plaintiff's subjective pain
12 complaints.

13 19. However, a claimant need not present clinical or
14 diagnostic evidence to support the severity of his pain.
15 Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990)
16 (observing that "it is the very nature of excess pain to be out
17 of proportion to the medical evidence").

18 20. In support of his claim for disability, plaintiff
19 presents the certifications and/or reports of three individuals,
20 all of whom personally evaluated and treated plaintiff. First,
21 plaintiff submitted the certification by Dr. Abbott, his regular
22 treating chiropractor, which concluded that plaintiff was
23 permanently disabled. Second is the report of Dr. Snook, who
24 conducted a complete medical history review and IME in 2005, and
25 concluded that plaintiff was permanently disabled. Finally,
26 plaintiff submitted a report by Mr. Gray, prepared after a
27 functional capacity evaluation, which indicated plaintiff's
28

1 specific limitations and the conclusion that he could likely
2 only tolerate part-time work.

3 21. In addition to the physician reports above,
4 plaintiff also presented the findings of a vocational
5 rehabilitation program, Pride Industries, which focused
6 specifically on what tasks and/or jobs plaintiff would be
7 capable of performing given his physical limitations. As with
8 the three individuals above who examined plaintiff in person,
9 the report concluded that plaintiff was not capable of full time
10 employment.

11 22. A finding that the claimant lacks credibility
12 cannot be premised wholly on a lack of medical support for the
13 severity of his pain. Lester v. Chater, 81 F.3d 821, 834 (9th
14 Cir. 1995) ("Once the claimant produces medical evidence of an
15 underlying impairment, the Commissioner may not discredit the
16 claimant's testimony as to subjective symptoms merely because
17 they are unsupported by objective evidence").

18 23. While some of the evidence supporting plaintiff's
19 claim for disability is admittedly more subjective, it is the
20 very nature of pain that it cannot be easily measured or proven.
21 Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986) ("'Excess
22 pain' is, by definition, pain that is unsupported by objective
23 medical findings.")

24 24. In this respect, plaintiff presents the more
25 credible and probative evidence, which focuses specifically on
26 showing not what objective indicators exist, but what the
27 effects of those objective indicators are. In particular,
28 plaintiff's FCE by Mr. Gray as well as the report by Pride

1 Industries go directly to demonstrating what plaintiff would be
2 capable of in a work environment.

3 25. This court thus finds that, under the meaning of
4 the Policy, "because of injury or sickness" plaintiff is "unable
5 to perform all the material duties of his regular occupation on
6 a full-time basis."

7 26. In addition to this requirement, for "partial
8 disability" the Policy requires that plaintiff be: 1) performing
9 at least one of the material duties of his regular occupation or
10 another occupation on a part-time or full-time basis; and 2)
11 earning currently at least 20% less per month than his indexed
12 pre-disability earnings due to that same injury or sickness."
13 (UACL 01874.)

14 27. Defendant contends that plaintiff's sales of
15 spare computer parts after 1999 do not constitute part-time
16 work, but are instead merely "a hobby or past-time," and that
17 plaintiff has failed to provide sufficient "proof" of his
18 monthly earnings so as to support a claim for partial
19 disability. (Def.'s Trial Br. 20.)

20 28. For the years 1997 through 1999, plaintiff
21 submitted tax returns evidencing gross revenues of \$4,250,
22 \$11,851, and \$14,451. After 1999, however, plaintiff's part-
23 time activities suffered a noticeable decline in profitability,
24 during which asserts he averaged roughly \$100 per month in
25 income over the next two years. In 2002 and 2003, as evidenced
26 by the receipts in the administrative record, plaintiff's
27 business activities were limited one or two sales a month of
28 various scrapped computer parts, costing between \$10 and \$20.

1 29. Reading the language of the Policy in its
2 "ordinary and popular sense," Allstate, 757 F.2d at 1044, this
3 court finds these activities to constitute "part-time" work.
4 Undoubtedly, plaintiff's business transactions are minimal, but
5 they are nonetheless activities, of the exact same sort that he
6 carried out with more frequency in years prior, that utilize
7 plaintiff's particular area of expertise in order to produce
8 income.

9 30. Plaintiff's efforts at returning to some sort of
10 work in spite of his injury cannot act to preclude his claim for
11 partial disability--indeed, this would run counter to the entire
12 purpose of the Policy. The success of plaintiff's claim for
13 disability benefits cannot be made to turn on the relative
14 financial success or failure of his part-time venture.

15 31. Defendant is of course correct that the Policy
16 requires plaintiff to submit proof of monthly earnings.⁶
17 However, the purpose of this requirement is simply to allow UNUM
18 to properly adjust any benefits, given plaintiff's supplemental
19 income.

20 32. While plaintiff's evidence of part-time work for
21 2000 through 2003 is indeed sparse, and does indicate that his
22 part-time work did not yield a substantial amount of income, it
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24
25
26

27 ⁶ "Proof of the insured's monthly earnings must be given
28 to the Company on a quarterly basis. Benefit payments will be
adjusted upon receipt of this proof of earnings." (UACL 01877.)

1 is nonetheless sufficient to allow UNUM to appropriately adjust
2 plaintiff's disability benefits.⁷

3 33. Defendant contends that, as a result of this
4 court's previous order, plaintiff can now circumvent the
5 requirements of continuing proof of disability and regular care
6 of a physician under "total disability," by simply bringing a
7 claim for partial disability. (Def.'s Trial Br. 20.)

8 34. As this court noted in that prior order, however,
9 such lowered requirements "make[] sense in the overall scheme of
10 the policy. An insured who is 'disabled,' as defined by the
11 policy, would not be working and therefore more likely to be
12 under the care of a doctor than someone who is 'partially
13 disabled.'" (May 29, 2002 Order.)

14 35. These are the terms of the Policy, interpreted in
15 their "ordinary and popular sense," Allstate, 757 F.2d at 1044,
16 and it would not be proper for this court to establish an
17 arbitrary cut-off point at which "part-time" work ceases to be
18 "part-time" work but instead a hobby or past-time.

19 36. If at some point it becomes clear that plaintiff
20 is not engaged in any part-time work, then of course UNUM has a
21 right to demand proof of continuing disability and regular care
22 of a physician.

23 37. However, for the reasons stated above, this court
24 finds that defendant's denial of plaintiff's claim for partial
25 disability benefits was improper.

26
27 ⁷ Neither party disputes that plaintiff's part-time income
28 falls well below the Policy requirement of being no more than 80%
of his indexed pre-disability income.


38. Plaintiff's monthly disability benefits are \$1,717.20 per month, and the period between September 1998 and December 2006 constitutes 100 months unpaid.

_____IT IS THEREFORE ORDERED THAT plaintiff's claim for partial disability benefits be, and the same hereby is, GRANTED, in the sum of \$171,200.00.

IT IS FURTHER ORDERED THAT plaintiff is entitled to benefits going forward, conditioned on the requirements of the Policy as interpreted by this order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 19, 2006


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE